(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

Allison Alphonso Ross,

Petitioner

v.

University of South Carolina

On Petition For Writ of Certiorari
To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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36 pp

Questions Presented for Review

1. Did the lower Court err ruling the "statute of limitations" was not tolled pursuant to 28 USC 1367 (d); thereby, petitioner's claim was untimely and barred by the doctrine of res judicata and collateral estoppel?

2. Did the lower Court err in its ruling that the University of South Carolina's policy and procedures manual did not form a contract with petitioner?

Parties to the Proceeding/Rule 14.1(b)

The parties to the proceeding are Plaintiff, Allison A. Ross and Defendant, the University of South Carolina. Rule 29.6 does not apply.

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Citations of Opinions and Orders

The following is a list of the citations of opinions and orders entered in the case by courts or administrative agencies: 2000-CP-40-02241 "Petition for Writ of Certiorari Denied" by Jean H. Toal, Chief Judge South Carolina Supreme Court; Order Denying Petition For Rehearing by Judges Goolsby, Howard and Shuler; South Carolina Court of Appeals Unpublished Opinion No. 2002-UP-586 by Judge Goolsby, South Carolina Court of Appeals; Order Case No: OO-CP-40-2241 by Judge Jackson V. Gregory, South Carolina Circuit Court Fifth Judicial District

Basis For Jurisdiction

This is a civil action arising under 28 U.S.C. sections 1331,1367 and 42 USC section 1981. The Supreme Court of the State of South Carolina denied the petitioner's Petition for Writ of Certiorari on April 24, 2003. The Supreme Court has jurisdiction pursuant to U.S. Code 28 sections 1331, 1367 and 42 USC 1981.

Constitutional Provisions, Treaties, Statues, Ordinances and Regulations

The following constitutional provisions, treaties, statues, ordinances and regulations are involved in this case: 28 USC sections 1331,1367 and 42 USC section 1981. The pertinent text is outlined in the appendix.

Facts

Mr. Ross an African-American began employment with the University of South Carolina ("USC") on July 1982 and worked continuously until September 3, 1998. Mr. Ross served the mandatory six-month probationary period and became a classified state employee according to the South Carolina Code of Laws. Mr. Ross continued to progress within

the department and when a chance for promotion to Associate Director became vacant. Mr. Ross applied for the position. After the selection process was complete, Tom Battenhouse, a White male was awarded the position.

Mr. Ross, believing he was being discriminated against and after exhausting all administrative remedies; with the advise of an attorney, filed a discrimination complaint in United District Court for the District of South Carolina,

On June 1, 2000 Judge Joseph F. Anderson jr., Chief Judge United States District Court for the District of South Carolina, issued an Order in case C/A No.; 3 99-984-17BD. In his ruling Judge Anderson dismissed the petitioners pendent state claim with instructions petitioner had thirty days to file the state claim in the appropriate court of common pleas. [Appendix pg]

Mr. Ross on June 8, 2000, filed an action in South Carolina State Court against The University of South Carolina, an agency of the state. Mr. Ross alleged he had entered into valid and enforceable contract with the University for employment by virtue of the employee handbook/policies and procedures manual produced by the University. The University breached said contract by failing to adhere to criteria for discipline and or termination contained as outlined in its policy manual/handbook.

Mr. Ross sought compensatory damages against the University of South Carolina and such other actions and other damage and relief, as the court may deem appropriate, just and proper.

The Summary Court granted summary judgment to the University of South Carolina and petitioner appealed to SC Court of Appeals.

ARGUMENT

QUESTION 1

Did the lower Court err ruling the "statue of limitations" was not tolled pursuant to, 28 USC §1367(d); thereby petitioners claim was untimely and barred by the doctrine of res judicata and collateral estoppel?

The ultimate issue in this case is the lower Court's refusal to acknowledge the express language of the Law. In his order granting Summary Judgment, Judge Gregory ignores Mr. Ross's argument on 28 USC 1367. Mr. Ross presented testimony in his motion in Opposition to Summary Judgment and at the hearing [R pg 29] that his action was in accordance with Federal Law.

At the appellate level petitioner again argued that consideration be given to the Federal Law. [brief pg. 24-25]. Nevertheless, the Court of Appeals affirmed the decision of the lower court stating: The action with the Federal Court did not toll the statue of limitations. The petitioner's appeal was untimely and the issues raised were previously litigated and therefore barred by res judicata and collateral estoppel. [Affirmation]. Mr, Ross in his request for rehearing in an attempt to further convince the Court of the 1367 issue submitted letters from his attorney stating the statue of limitations were tolled in the present case. [Request for Rehearing].

The law does not support the decision rendered by the Court of appeals.

Where testimony is conflicting upon the application of the statute of limitations, the question becomes and issue of fact for the jury. Brown v. Finger, 240 S.C. 102, 124 S.E. 2d 781 (1962); Arant v.Kressler, 327 S.C. 225, 489 S.E. 2d 206 (1997). The appellant filed a federal claim against the University of South Carolina for retaliation and violation of

First Amendment rights. This federal claim included a pendant state claim for breach of contract.

The Recommendation from Magistrate Marchant and cited in Judge Anderson's Order reads:

> "If the District Court adopts the recommendations made herein with regard to Plaintiffs two remaining federal claims, Plaintiffs pendant state law claim, which is asserted only against the Defendant University of South Carolina, will be the only claim remaining in this lawsuit. When federal claims presented in a case originally filed in federal court are dismissed, any remaining states claims should also be dismissed, without prejudice, for resolution in state court under the general doctrine developed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). See In Re Conklin, 946 F.2d 306, 324 (4th Cir, 1991); Mills v. Leath. 709 F. Supp. 671,675-676 (D.S.C. 1988); Carnegie-Melon v. Cohill 484 U.S. 343 (1988); Carnegie-Melon v. Cohill 484 U.S. 343 (1988); Taylor v. Waters, 81 F . 3d 429, 437 (4th Cir. 1996). Dismissal of this remaining state law cause of action will not only allow the more appropriate court to rule on this exclusively state claim, but will not prejudice the parties, as the

> parties may seek a fast track for resolution of this claim at the state level. See Rule 40 (c), S.C.R.C.P. Further, this Court is also not required to retain supplemental jurisdiction over this remaining state law claim on grounds that the state statute of limitations for bringing this claim may have now expired. Federal law provides for tolling of state statutes of limitations for state claims during the period they were pending in federal court and for thirty (30) days afterwards. See 28 U.S.C.A.S 1367(d); Hedges v. Musco, et.al., 204 F.3d 109, 123-124 (3rd Cir. 2000); Beckv.Prupis, 162 F 3d 1090, 1099-1100 (11th Cir. 1998) ["a dismissal under section 1367 tolls the statute of limitations on the dismissed claims for 30 days"]; Seabrook v. Jacobson, 153 F. 3d 70, 72 (2d Cir. 1998)["Section 1367 (d) ensures that the plaintiff whose supplemental jurisdiction is dismissed has at least thirty days after dismissal to refile in state court."] (Appendix pg.17a)

The appellant's pendant state claim was dismissed without prejudice on June 2, 2000, and the appellant filed in the Richland county court on June 8, 2000. The appellant explained this process to the lower court and outlined the rules of supplemental jurisdiction on the issue [transcript of the hearing: Record at 15, 19, 26]. ("[Dismissal...without prejudice' is a dismissal that does not' operat[e] as an adjudication upon the merits,' and thus does not have a res judicata effect.") (alterations in original) (citation omitted) (construing language of Fed. R. Civ. P. 41 (a)).

QUESTION 2

Did the Lower err ruling the University's Policy and Procedures Manual did not Form a contract with Mr. Ross?

At Summary Judgment Judge Gregory (l) stated "finally this Court is unpersuaded that plaintiff has presented any evidence that a contract existed between himself and the University". Petitioner refutes this decision. Petitioner directs the Court's attention to Petitioner's Opposition to Summary Judgment [R. Opposition to Summary Judgment pg 2-3.] Petitioner also directs the Court's attention to Small v. Springs Industries. Inc. 292 S.C. 481 (1987) and Baril v. Aiken Regional Medical Centers (Opinion 3561, Heard October 8, 2002, filed October 28, 2002). The Supreme Court should note that Judge Gregory was the lone dissenting judge in Smalls v Spring Industries Inc. 292 S.C. 481 (1987).

In Ludwick v. This Minute of Carolina Inc., 287 S.C. 219, (1985), the South Carolina Supreme Court joined an increasing number of courts that have questioned the continued viability of the employment at will doctrine. In Ludwick. the Court recognized our first exception to the "at-will" doctrine when it formally recognized a cause of action called "wrongful discharge in violation of public policy" when the employer terminated an employee for duly honoring the subpoena of a state administrative board. Two years after the Ludwick case, the South Carolina Supreme Court in Small v. Springs Industries. Inc., 292 S.C. 481 (1987), allowed an employee to rebut the at will presumption and hold the employer liable for breach of contract.

Kathy Small had worked at Springs Industries for five years when the company issued a **handbook** and bulletin to its employees. That handbook and bulletin detailed the company's progressive discipline procedure for terminating an employee. Those documents provided for a four-step disciplinary procedure that consisted of a verbal reprimand, a written warning, a final written warning and discharge. Also, Small's supervisor orally assured the employees that the four-step process would be uniformly applied.

In spite of these promises, Springs Industries discharged Small after only one written warning. Small sued the company under **breach of contract** and the trial judge allowed the jury to determine whether the handbook, the bulletin and the oral assurances by Small's supervisors altered the otherwise at-will employment relationship. At the trial of the matter, the jury found for Small and awarded her $300,000 for breach of the employment contract When Springs appealed, the South Carolina Supreme Court affirmed the jury's finding. University policies H.R.1.36 and H.R. 1.39 for progressive discipline and termination procedures were not followed [R. 223-239]. The issue of existence of a contract is a question of fact for the jury when its existence is questioned and the evidence is either conflicting or gives rise to more than one inference Small v. Springs Indus. Inc.. 292 S.C. 481, 357 S.E 2d 452 (1987). Additionally, "if dismissal from employment is based on a defined procedure...that procedure must be scrupulously observed". Service v. Dulles, 304 U.S. 363.

Additionally, the appellant cited S.C. Law 8-17-310 and 8-17-330, which establishes the petitioner as a covered employee vested in the state system. The respondents state that the petitioner did not read the policies and procedures before employment. However, no state employee does. S.C. Law 8-17-330 states "a copy of the approved agency grievance procedure must be made available to covered employees of the agency". The law provides each state employee protection from adverse punishment by requiring a procedure of progressive discipline and state grievance procedures.

The respondent's cite "just cause". However, determining "just cause" is a question of fact to be determined in each particular circumstance and employment situation. The employee's conduct should be judged not only by the individual action but also by his past conduct and length of service that helps to put any individual act of alleged misconduct in context. In situations of deteriorating

performance, before dismissing on this ground and alleging, "just cause" the courts in these circumstances have implied a general duty on the employer to warn the employee about his performance or lack thereof and need to improve. The petitioner received no warnings that he would be terminated for failure to remove a putting green from his office or keep his office door open [R. 194-200] & [R. 225-226]. The employer must also give the employee sufficient time for the employee to improve before there will be grounds to dismiss the employee summarily upon the ground of "just cause". The warning to the employee must be clear and unequivocal, which in general requires, the warnings to be in writing. Petitioner received no warnings. Gene Luna of the University of South Carolina admits that there were no warnings given. [R.195-200].The employer must also outline to the employee the steps needed to be taken to improve and recommend to the employee areas in which the employee could improve upon. Petitioner received no information regarding areas for improvement. The employer who gives the employee a period of time to improve cannot dismiss during this trial period on the grounds of "just cause". If the employer has knowledge of misconduct, incompetence or any other transgression of the employee and condones such conduct it cannot use such conduct as grounds for dismissal on the basis of "just cause". The University of South Carolina did not comply with these provisions. These are issues are issues for jury determination.

Furthermore, in King v. PYA Monarch, Inc., (1995), the South Carolina Supreme Court held that an employer who voluntarily chose to (1) publish "Rules and Regulations" and (2) orally assure employees that company policies and procedures would be followed cannot deviate from such assurances at its pleasure. Most recently, the South Carolina Supreme Court held that a contract altering the at- will arrangement may arise, in part, from the oral statement of the

employer arising to an oral contract of definite employment. Most employment contracts are unilateral; hence, to establish the existence of a definite contract of employment by unilateral contract, the employee must establish: (1) a specific offer; (2) communication of the offer to the employee; (3) performance of job duties reliance on the offer. Prescott v. Farmers Telephone Coop., Inc., No. 24948 (S.C. Sup. Ct. June 1,1999) (Shearouse Adv. Sh. No. 19). The appellant had sixteen years of satisfactory service with the University of South Carolina and each year the plaintiff signed an E.P.M.S. form describing job duties and outlining what was to be completed. These facts constitute a contract under Prescott.

Additionally, in this case, a jury should have had the opportunity to review the decision to not adhere to policy by using progressive discipline, to skip the oral warning, the written warning, and the suspension, and instead resort to dismissal. The supervisor was under the impression that he had the power to deviate from the contract formed by University policies H.R. 1.36 and 1.39 and determine that appellant actions were insubordination to justify termination. Battenhouse admitted that he was not the chair of the department making the letter of termination illegal in accordance with H.R. 1.39. The supervisor bypassed the oral warning, the written reprimand, the suspension, and went to the most severe punishment-termination. This is breach of contract. This issue and the issue of whether the handbook formed a contract should have been submitted to a jury.

In October 2002, The Supreme Court reversed and remanded a South Carolina case. Baril v. Aiken (Opinion 3561, Heard October 8, 2002, Filed October 28, 2002) was reversed and remanded by the Supreme Court. The questions are similar to those posed by petitioner Ross regarding circuit court error in granting summary judgment on the issues of

policy and procedure and breach of contract. Baril maintained that the Circuit court erred in granting summary judgment because, viewing the evidence in the light most favorable to Baril as the non moving party, material issues of fact exist concerning whether the hospital's written policies and procedures created an actual contract between Baril and the Hospital.

Because an employee handbook may create an employment contract, the question of whether a contract exists is for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference. Conner v. City of Forest Acres, 348 S.C. 454. 560 S.E.2d 606 (2002) (stating summary judgment is inappropriate in most instances when handbook contains both a disclaimer and promises). The petitioner's brief pages 9-11 outline several statements of law with regard to summary judgment. The petitioner also outlines several questions in the brief that provide that there is a genuine issue of fact, that further inquiry into the facts is desirable, and that there is a dispute over evidentiary facts.

CONCLUSION

Upon the foregoing reasons, the Court should Grant as a matter of Law this Writ of Certiorari.

Respectfully submitted

Allison A. Ross

Allison A. Ross, pro se

Dated: July 15, 2003.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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April 24, 2003

REGULAR AND CERTIFIED MAIL
Mr. Allison Ross
505 Quail Valley Road
Hopkins, SC 29061

Re: Ross, Allison v. University of SC
2000-CP-40-02241

Dear Mr. Ross:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

April 24, 2003."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

The South Carolina Court of Appeals

Allison A. Ross, **Appellant,**

v.

University of South Carolina, **Respondent,**

Appeal from Richland County
Jackson V. Gregory, Circuit Court Judge

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

IT IS SO ORDERED.

J.

J.

J.

THE STATE OF SOUTH

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allison A. Ross,

Appellant,

v.

University of South Carolina,

Respondent.

Appeal From Richland County
Jackson V. Gregory, Circuit Court Judge

Unpublished Opinion No. 2002-UP-586
Submitted September 9, 2002- Filed September 19, 2002

AFFIRMED

Allison A. Ross, of Hopkins, pro se.

C. Frederick W. Manning, II, of Columbia, for respondent.

PER CURIAM: Allison A. Ross (Ross), a former employee of the University of South Carolina (USC), appeals the circuit court's grant of summary judgment to USC. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ross began working for USC as an Area Manager for Residential Life Services on July 22,1982. After several years, he was promoted to the position of Assistant Director of Housing Maintenance.

In 1997, the position of Associate Director of Housing Facilities became vacant. Thirty-eight people, including Ross, applied for the position. Dr. Luna, Director of Housing at USC, hired Tom Battenhouse for the position in March 1998.

On March 16, 1998, Ross filed a complaint alleging he was not hired by USC as the result of age, race, and veteran status discrimination. USC's Office of Equal Opportunity Programs (EOP Office) conducted a thorough investigation. The EOP Office determined that the screening committee's failure to select Ross was not the result of discrimination and the file was closed on May 7, 1998.

Ross was one of four employees in supervisory positions who reported directly to Battenhouse. On April 1, 1998, Battenhouse sent a memo to these employees requesting a meeting to discuss the construction projects that would be happening during the summer. Battenhouse requested that each employee be prepared to update him on the status of each project and make any suggestions. Ross came to the meeting unprepared to discuss the .projects under his supervision. The supervisors agreed to submit a written report on their projects no later than the following Monday. Battenhouse had to make a second request from Ross for

the report and the report eventually turned in by Ross did not follow the format requested by Battenhouse. Battenhouse had several other problems with Ross. On April 13, 1998, Battenhouse requested that Ross write a memorandum to address the events surrounding the double purchase of uniforms for employees in Ross's department. Ross refused to write the memorandum. On May 1, 1998, Battenhouse had a meeting with Ross to discuss the duties of his position. At the meeting Ross informed Battenhouse that the rules did not apply to him. When Ross indicated that he was not sure what was included in his job duties, the meeting was concluded until Battenhouse could find a more accurate job description. When they met again on May 7,1998, Battenhouse presented Ross with an updated job description. Ross stated that the job description was accurate "for the next person." Ross refused to sign the updated job description.

Battenhouse also requested that Ross remove the large putting green from his office by May 15,1998, and that he stop practicing golf during work hours. On July 28, 1998, Ross practiced hitting golf balls against the wall, making a disruptive sound similar to a gun discharging. As of August 24,1998, Ross had riot removed the putting green.

Battenhouse instructed Ross to keep his office door open and unlocked during business hours unless Ross was having a highly confidential meeting. Ross failed to comply with that request. Battenhouse observed Ross's door locked and closed on June 24,1998, July 16,1998, July 22, 1998, and July 29, 1998.

Ross failed to attend weekly supervisors' meetings between Battenhouse and fETe four supervisors and attempted to cancel several meetings without justification. He did not attend the department retreat and the proceedings to give out the award for the employee of the month. Ross failed to attend monthly management meetings. On several occasions, Ross failed to

appear at work without prior notification to Battenhouse and without getting prior approval for annual leave.

On June 12, 1998, Ross was sent a memorandum outlining his unacceptable behavior and requesting that he attend Employee Assistance Program (EAP) counseling as a condition of his continued employment. Ross successfully completed the EAP counseling. However, he continued to disobey Battenhouse's prior directives regarding meeting attendance, locking his door, and practicing golf while at work.
Battenhouse fired Ross on September 3, 1998. In the letter of dismissal Battenhouse cited examples of Ross's insubordination. The letter also informed Ross of his right to file a grievance under the grievance policy. The letter was signed by Battenhouse.

Ross unsuccessfully appealed his dismissal through USC's grievance procedures. He then appealed USC's decision by filing a state employee grievance procedure appeal form with the State Human Resources Director. The appeal was forwarded to the State Employee Grievance Committee, and a hearing was held on January 26, 1999. At the hearing, Ross argued that his dismissal was in retaliation for the discrimination suit he filed in March 1998 and was in violation of several USC policies. On February 12, 1999, the Grievance Committee issued its final decision upholding USC's decision to terminate Ross. The Grievance Committee found that Ross was insubordinate and that USC acted within its discretion. Ross requested a rehearing from the Grievance Committee. This request was denied on April 2,1999. Ross did not appeal this decision to the circuit court.

On April 7,1999, Ross, through counsel, filed a new action in the United States District Court for the District of South Carolina alleging discrimination and retaliation under 42 U.S.C. § 2000 e, violations of 42 U.S.C. §§ 1981 and 1983^-and breach of his employment contract. The district court granted USC summary

judgment on all of the federal claims and dismissed the breach of contract claim on June 1, 2000. Ross unsuccessfully appealed the district court's order to the Fourth Circuit Court of Appeals and then to the United States Supreme Court.

Ross filed the underlying action pro se in circuit court on June 8, 2000. He alleged in his complaint that USC breached its employment contract with him. He demanded actual and punitive damages for his lost wages and benefits, mental anguish, and loss of enjoyment of life.

USC moved for summary judgment. A hearing was held on February 12, 2001. The circuit court found Ross failed to "seek judicial review of the Grievance Committee's final decision by petitioning the appropriate court of common pleas" and therefore the Grievance Committee's final decision upholding Ross's termination was final and binding upon the circuit court. The circuit court further found Ross's breach of contract claim was barred by res judicata and collateral estoppel. The circuit court stated that even if Ross's current action could be viewed as a timely appeal of the Grievance Committee's final decision, the Grievance Committee's decision was supported by substantial evidence. The circuit court granted USC summary judgment. This pro se appeal follows.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440,452,548 S.E.2d 868, 874 (2001). Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56 (c), SCRCP. However, summary judgment is not appropriate where there is no dispute as to the facts but the parties dispute the inferences to be drawn from the undisputed facts. Tupper v. Dorchester County, 326 S.C. 318, 325,487 S.E.2d 187,191 (1997). "In determining

whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne ex rel. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d319, 321 (2001).

LAW/ANALYSIS

Ross argues the circuit court erred in granting summary judgment because it (1) erroneously relied upon inferences from the evidence and credibility determinations, which presented questions of fact for the jury; (2) erred in finding the policy manual did not form an employment contract; and (3) erred in finding the action was barred by res judicata and collateral estoppel. We hold that the circuit court did not err in granting summary judgment to USC.

Once an employee appeals a dismissal through USC's grievance procedure, the employee must appeal through the State Employee Grievance Committee. S.C. Code Ann. § 8-17-340 (Supp. 2001). After the Grievance Committee has rendered a final decision, the employee must appeal to the court of common pleas in the county where the employee was employed. S.C. Code Ann. § 8-17-340(F). "Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision thereon." S.C. Code Ann. § 1-23-380(A)(1) (Supp. 2001) (emphasis added).

The Grievance Committee determined on Februrary 12, 1999, that USC did not violate any policy in terminating Ross. They denied his request for a rehearing on April 2, 1999. When Ross failed to appeal the Grievance Committee's decision to the circuit court within thirty days, this decision became final. The action filed with the federal district court was a new action, not an appeal of the Grievance Committee's decision, and it did not toll the thirty-day time limit. In Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 408 S.E.2d 230 (1991),

Bennett was discharged from his job at the Department of Corrections (DOC). He filed a grievance with the Grievance Committee challenging the discharge. The Grievance Committee upheld DOC's decision to discharge Bennett. Bennett did not appeal the Committee's decision but instead brought a new action in the circuit court for retaliatory discharge. The court granted summary judgment to DOC and the supreme court affirmed stating: "Here, the Employee did not prevail before the Grievance Committee, and by not appealing their decision, abandoned his only opportunity to gain a favorable ruling-on the issues involving his termination." Id. at 312, 408 S.E.2d at 231.

Furthermore, we agree with the circuit court that the underlying action filed by Ross is barred because the factual and legal questions regarding whether he was appropriately dismissed were previously litigated. Thus, the issues raised in Ross's current action are barred by res judicata and collateral estoppel. See Id at 312, 408 S.E.2d at 231 ("[UJnder the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.").

Because Ross failed to file his appeal with the circuit within thirty days of the Grievance Committee's denial of his request for a rehearing and the issues raised in his new action were previously litigated, we find no error in the circuit court's decision to grant summary judgment to USC.

Based on the forgoing, the decision of
the circuit court is **AFFIRMED.**

GOOLSBY, HOWARD, and SHULER, JJ., concur.

Order-gregory

This matter came before the Court for a hearing on Monday, February 12, 2001. The Court has considered the pleadings and other materials on file in this action. The Court has also considered the excerpts of deposition testimony, affidavits, documents, memoranda of law, and arguments presented by counsel for defendant and those presented by plaintiff Allison Alphonso Ross, *pro se.*

Having considered these factors, and for the reasons given below, the Court finds that there are no issues or material facts which must be tried to determine the validity of plaintiff s claim against the University of South Carolina. This Court grants defendant University of South Carolina's Motion for Summary Judgment.

The complaint, as presently before the Court, alleges a single cause of action against defendant University of South Carolina. Plaintiff has alleged that a valid and enforceable contract existed between himself and the University by virtue of the defendant's policies and procedures governing employee performance and discipline. Plaintiff had been employed with the University from 1982 until September 3, 1998. The problems that led to Ross' dismissal began shortly after the University hired Thomas Battenhouse, plaintiff's direct supervisor, as the new Director for Housing Facilities Management. The record shows that from March to September 1998, Ross refused to carry out several directives from his supervisor and became increasingly insubordinate. Various attempts to inform Ross that his behavior was unacceptable met with no success. Finally, after a written warning given by the Vice President for Student and Alumni Services, Dr. Dennis A. Pruitt, the decision was made to terminate Ross for insubordination.

Plaintiff exercised his appeal rights provided by the University. Ross specifically challenged the University's actions on the grounds that the proper policies and procedures were not followed in either warning him of his declining performance or in properly terminating him. Plaintiff maintained that he should have received a written warning pursuant to University policy H.R. 1.36 which deals with substandard performance. Also, plaintiff contends that the University—failed to comply with policy H.R. 1.39 because his-Notice of Dismissal was not signed by a department chair.

Each of plaintiff s appeals through the University were denied. Plaintifft then appealed to the State Employee Grievance Committee. A full hearing was held on January 26, 1999. At the Grievance Committee hearing, Ross expressly argued that his dismissal was in violation of University policies H.R. 1.36 and 1.39. Plaintiff testified that he was never made aware his job was in jeopardy nor was he ever counseled or reprimanded about his job performance in accordance with these policies. Plaintiff also testified that he was not given the opportunity to explain his conduct.

On February 12, 1999, the Grievance Committee issued its final decision. The Committee found plaintiffs arguments unpersuasive. Specifically, the Grievance Committee found that plaintiff had been given time to improve his behavior but chose not to obey the reasonable directives given to him by superiors. Moreover, the Grievance Committee found that plaintiff had received several oral and written directives which constituted sufficient warning of his misconduct. In its final decision, the Grievance Committee expressly held that the University followed the appropriate policies and procedures in dismissing plaintiff.

Plaintiff requested a rehearing from the Grievance Committee pursuant to S.C. Code Ann. § 8-17-340(F). The request was denied on April 2, 1999. Thereafter, plaintiff

filed an action in the United States District Court for the District of South Carolina asserting federal causes of action and a state law breach of contract claim.[1] The federal litigation was ultimately dismissed pursuant to summary judgment, however the breach of contract claim was dismissed without prejudice. On June 8, 2000, plaintiff filed the instant action.

As the non-moving party, plaintiff must come forward with the specific evidentiary facts apart from his pleadings establishing the existence of genuine issues of material fact in order to survive summary judgment. Rule 56(e), S.C.R.C.P. plaintiff has presented no evidence from which a reasonable inference could be drawn that would be sufficient to state a claim for breach of contract. An even greater challenge to plaintiffs present action, however, is presented by the undisputed fact that plaintiff failed to appeal the final decision of the Grievance Committee as required by statute. Therefore, this present action is untimely and barred by the doctrines of *res judicata* and collateral estoppel.

As an employee covered by the State Employee Grievance Procedure Act, plaintiff was required to file a petition for judicial review in the Court of Common Pleas within thirty days of the Grievance Committee's denial of his petition for rehearing. S.C. Code Ann. § 1-23-380 and 8-17-340; Smith v. South Carolina Dept. of Health & Environ. Control, 296 S.C. 514,517,374 S.E.2d 498,499 (Ct. App. 1988) (appeal of a final decision is to the court of common pleas). This Court finds that plaintiff failed to seek judicial review of the Grievance Committee's final decision by petitioning the appropriate court of common pleas. As such, the Grievance Committee's decision is final and binding on this Court. Smith v. South Carolina Retirement Systems, 336 S.C. 505, 532,520 S.E. 2d 339,353, (Ct. PP. 1999) (failure to appeal a final decision waives the opportunity to be heard on the merits).

As an additional grounds for granting the University summary judgment, this Court finds that plaintiffs breach of contract claim is barred by the doctrines of *res judicata* and collateral estoppel. An employee who fails to appeal the Grievance Committee's final decision is barred from bringing a new cause of action based upon the same factual transaction. *Bennett v. South Carolina Dept. of Corrections,* 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991). The decision of an administrative tribunal that has become final and binding precludes the re-litigation of issues addressed by that tribunal in a collateral action. *Id.; Perry v. State Law Enforcement Div.,* 310 S.C. 558, 426 S.E.2d 334 (Ct. App. 1992); *Hyde* v. *South Carolina Dept. of Mental Health,* 314 S.C. 207, 442 S.E.2d 582 (1994) (resolution of factual issues before Grievance Committee are binding in a collateral action brought in court).

The Court finds that plaintiff argued the same issues before the Grievance Committee that he presents in the instant action. The case before the Grievance Committee concerned the same parties and events that are in dispute in this case. In its final decision, the Grievance Committee found that Ross was insubordinate when he did not obey the reasonable directives given to him by his supervisor and that the University properly exercised its discretion when dismissing him.

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[1] Plaintiff was represented by counsel in his federal litigation.

Any attempt by plaintiff to relitigate the same facts and issues presented to the Grievance Committee before this Court is prohibited under the doctrines of *res judicata* and collateral estoppel.[2]

Finally, this Court is unpersuaded that plaintiff has presented any evidence that a contract existed between himself and the University. Plaintiff bases his contract claim upon the theory of unilateral contract arising from the University's policies and procedures, however, plaintiff has produced no evidence showing that there was an offer, acceptance and consideration. *Small v. Springs Industries, Inc., 292* S.C. 481, 357 S.E.2d 452 (1987). Plaintiff admits that he signed no written contract and was never promised by the University that he would be employed for a specific period of time. Plaintiff also admits that he neither reviewed nor received a copy of the University's policies and procedures prior to accepting employment with the University. It necessarily follows that plaintiff cannot prevail on a breach of contract claim absent establishing that the University made an offer to him to alter his at-will employment.

Assuming *arguendo* that the present action constitutes a timely appeal from the Grievance Committee's final decision, this Court is persuaded that the Grievance Committee's decision is supported by substantial evidence. *See* S.C. Code Ann. § 1-23-380; *O'Neal v. South Carolina Dept. of Social Services,* 313 S.C. 223, 224, 437 S.E.2d 127, 128 (Ct. App. 1993) (where substantial evidence supports an agency decision that decision will be affirmed).

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[2] Plaintiff did not appeal the decision of the Grievance Committee's decision when he filed suit in the United States District Court for the District of South Carolina. Under S.C. Code Ann. § 8-17-340 and § 1-23-380, the proper avenue for review of a decision of the Grievance Committee is to this State's courts of common pleas. The federal district court did not have jurisdiction to review the final decision of the Grievance Committee. *See Kirkpatrick v. Lenoir County Board ofEduc.* 216 F.3d 380, 387 (4th Cir. 2000).

Plaintiffs termination was clearly based upon his violation of University policy H.R. 1.39. The Grievance Committee specifically held, and this Court agrees that the University followed the appropriate policies and procedures in dismissing plaintiff. The undisputed evidence is that the University considered plaintiffs refusal to comply with his supervisor's reasonable directives as insubordination. Because plaintiff was terminated for insubordination and not substandard performance, University policy H.R. 1.36 did not apply. Moreover, the Grievance Committee found convincing the University's argument that plaintiffs dismissal notice was properly executed pursuant to H.R. 1.39 thus, this Court would affirm the final decision of the Grievance Committee upholding the termination of plaintiff.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment be, and is hereby, granted. AND IT IS SO ORDERED.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States

42 U.S.C. § 1981

(a) Statement of equal rights All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law